Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CARYL M. SHERMAN,

Petitioner,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, as amended (hereinafter referred to as "Title VII"), for an employer to discriminate in employment against an employee because of her status as an older woman?

2. Whether the U.S. Court of Appeals for the Sixth Circuit improperly refused to address Question No. 1 *supra* in upholding the grant of summary judgment against Petitioner's claim under Title VII based upon her status as an older woman?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Caryl M. Sherman (hereinafter referred to as "Sherman") and Respondent American Cyanamid Company (hereinafter referred to as "ACC").

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The Memorandum Opinion and Order of the U.S. District Court is reported at 996 F. Supp. 719 (N.D. Ohio 1998). All other opinions and orders below are unreported.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit issued its Decision on September 1, 1999. That Court denied the Petition for Rehearing on October 27, 1999. The U.S. Supreme Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1):

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF CASE

This is an action, in part, under §703(a)(1) of Title VII alleging that ACC engaged in unlawful sex discrimination in employment by terminating Sherman because of her status as an older woman.

Sherman began working for ACC on or about January 22, 1979. She continuously worked for ACC thereafter until she was notified of her termination on or about August 16, 1994. At the time of her termination, Caryl Sherman was a medical sales representative. Sherman was age fifty at that time and was rated a quality performer by ACC.

When Sherman was terminated, there was a general geographic reconfiguration of territories for medical sales representatives throughout the United States. In addition, there were some reassignments and terminations of medical sales representatives which resulted in a somewhat smaller medical sales representative workforce. ACC asserted that Sherman was selected for termination based upon performance criteria as part of its plan to reduce the number of medical sales representatives, while Sherman alleges, in part, that she was selected for termination because of her status as an older woman.

In support of this claim, Sherman submitted evidence for the purpose of showing that similarly-situated persons, outside her protected class of older women, were retained despite the fact that their performance was worse than that of Sherman. In granting summary judgment to Respondent regarding this claim, the U.S. District Court for the Northern District of Ohio held that a claim for sex discrimination under Title VII may be brought

based upon status as an older woman. However, the Court held that in comparing Sherman's treatment to that of persons outside her protected class, Sherman could only compare herself to older men. The District Court then concluded that Sherman had not presented evidence meeting this requirement.

On appeal, the U.S. Court of Appeals for the Sixth Circuit upheld the grant of summary judgment to Respondent on Sherman's claim of sex discrimination under Title VII based upon status as an older woman regarding her termination. However, the Court of Appeals expressly refused to determine whether a sex discrimination claim may be brought under Title VII based upon status as an older woman. The Court justified its failure to address this issue, in part, because it deemed it unnecessary in order to resolve this claim by Sherman. The Court stated that even if this theory of violation were viable under Title VII, Sherman would be unable to establish pretext in ACC's articulated reasons for terminating Sherman for the same reasons that the Court held there was insufficient evidence of pretext in ACC's articulated reasons for terminating Sherman regarding Sherman's claim she was terminated because of her age in violation of §4(a)(1) of the Age Discrimination in Employment Act of 1967, as amended (hereinafter referred to as "ADEA"), 29 U.S.C. §623(a)(1). The Court of Appeals also gave as a reason for not recognizing this sex-plus-age cause of action under Title VII that no federal court of appeals nor the U.S. Supreme Court has recognized such a cause of action.

The U.S. District Court in this case had jurisdiction over this Title VII claim in Sherman's Complaint under 28 U.S.C. §1331.

REASONS FOR ALLOWANCE OF WRIT

1. The Issue Of Whether A Sex Discrimination Claim May Be Brought Under Title VII Based Upon Status As An Older Woman Is An Important Issue Of Federal Law Which Should Be Addressed By The U.S. Supreme Court.

A writ of certiorari should be granted in this case to provide guidance on the important issue of whether a sex discrimination claim may be brought under Title VII based upon status as an older woman. Although the U.S. Court of Appeals for the Sixth Circuit upheld the grant of summary judgment to Respondent regarding Sherman's claim alleging termination based upon status as an older woman, it refused to indicate whether such a claim may be brought under Title VII.

There is substantial recognition that older women as a discrete group suffer widespread discrimination in employment separate and apart from that experienced by younger women and older men. See *e.g.*, Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis – A Pragmatic Model,* 28 Golden Gate U.L. Rev. 115, fn. 5 (1998), and sources referenced therein. Unless older women are accorded protected status as a separate group under Title

VII, this large subgroup of women will have no protection under federal anti-discrimination statutes against the pervasive and unique discrimination which they suffer.

The U.S. Supreme Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) held that a subgroup of women is protected under Title VII against discrimination that is not perpetrated against women outside the subgroup. In that case, the U.S. Supreme Court ruled that discrimination against the subgroup of women with pre-school age children constituted unlawful sex discrimination under Title VII. This theory of unlawful discrimination has become known as "sex-plus" discrimination.

Applying the rationale expressed by the U.S. Supreme Court in *Phillips v. Martin Marietta, supra,* various courts of appeal have held that employment discrimination against another subgroup of women, black women, constitutes unlawful sex discrimination under Title VII. Thus, the U.S. Court of Appeals for the Fifth Circuit in *Jefferies v. Harris Co. Community Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) held that discrimination against black females as a separate group constitutes unlawful sex discrimination under Title VII. The Court noted discrimination against black females based on that status could exist even in the absence of discrimination against black men or white females. In explaining the rationale for this decision, the Court in *Jefferies* indicated that "sex-plus" cases are viable when they concern sex plus an immutable characteristic or a constitutionally-protected activity. *Id.* at 1033-1034. In addition, the U.S. Court of Appeals for the Tenth Circuit in *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) similarly held that discrimination based upon status as a black

woman constitutes unlawful sex discrimination under Title VII.

Similarly, the U.S. Court of Appeals for the Ninth Circuit in *Lam v. University of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) upheld the viability of a sex-plus-race claim concerning the female subgroup of Asian women. The Court in *Lam* expressly recognized that the subgroup of Asian women is subject to a set of stereotypes and assumptions different than those regarding Asian men or white women. *Id.*

The policy and analytical reasons for recognizing the protection of these other subgroups of women under Title VII apply with at least as much force to the subgroup of older women. The size of this group and the extent of discrete employment discrimination against its members is at least as substantial as regarding the other subgroups of females discussed *supra*. In addition, the reasoning underlying the "sex-plus" criterion of sex plus an immutable characteristic recognized by the U.S. Court of Appeals for the Fifth Circuit in *Jefferies* as supporting the protection of black women should also be deemed to support protection of the subgroup of older women. Thus, a woman is no more able to change her age than her race.

In fact, various courts have recognized the viability of a sex discrimination claim under Title VII and analogous state statutes based upon status as an older woman. The U.S. District Court for the Eastern District of Pennsylvania in *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994) upheld the appropriateness of a sex-plus-age claim based upon the rationale expressed by the U.S.

Court of Appeals for the Fifth Circuit in *Jefferies*. The Court in *Arnett* recognized age as an immutable characteristic. *Id.* at 1241. That same Court later reaffirmed the viability of a sex-plus-age claim under Title VII in *Zekavat v. Philadelphia College of Osteopathic Medicine*, 1997 WL 136406 at *3-*4 (E.D. Pa. 1997).

In addition, the U.S. District Court for the Eastern District of Missouri has recognized the appropriateness of a sex-plus-age discrimination claim under Title VII. See *Hall v. Missouri Highway and Transp. Com'n*, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998). The viability of a sex-plus-age discrimination claim has also been recognized by the U.S. District Court for the District of Oregon in *Good v. U.S. West Communications, Inc.*, 1995 WL 67672 (D. Or. 1995). Furthermore, this theory of discrimination under Title VII has apparently been recognized by the U.S. District Court for the Southern District of New York. See *Renz v. Grey Advertising, Inc.*, 135 F.3d 217, 220 (2d Cir. 1997) (Court of Appeals references that District Court at the close of plaintiff's case at trial granted defendant's motion for judgment as a matter of law on "sex-plus-age" claim on grounds that plaintiff failed to present sufficient evidence to support a reasonable inference that her status as an older woman played a role in her termination).

In addition, the U.S. District Court for the Northern District of Ohio in the instant case indicated that a sex-plus-age claim may be brought under Title VII, although Sherman disagrees with the legal standards established by that Court for proving the claim. See *Sherman v. American Cyanamid Co.*, 996 F. Supp. 719 (N.D. Ohio 1998). The sex-plus-age theory prohibiting discrimination in

employment against older women has also been recognized under the analogous Ohio statute, Ohio Revised Code §4112.02(A). See *Myers v. Goodwill Industries of Akron, Inc.*, 122 Ohio App.3d 294, 301-302 (Ohio App. 9 Dist. 1997).

Because of the importance of this issue to a large segment of the U.S. population who are subject to this widespread and discrete type of employment discrimination, the U.S. Supreme Court should address this issue now and determine that the subgroup of older women are protected under Title VII. The U.S. Court of Appeals for the Sixth Circuit in the instant case upheld the grant of summary judgment against Sherman regarding her sex-plus-age claim under Title VII while refusing to determine the appropriateness of such a claim. Other courts of appeal may act in a similar manner which could result in a lengthy and seriously detrimental delay in providing authoritative guidance regarding this issue.

2. The U.S. Supreme Court Should Exercise Its Supervisory Power In This Case Since The U.S. Court Of Appeals For The Sixth Circuit Inappropriately Refused To Address The Issue Of Whether A Sex-Plus-Age Claim Is Viable Under Title VII.

One reason given by the Court of Appeals for failing to address this sex-plus-age issue was a determination it was unnecessary to do so in order to resolve Sherman's claim under this theory. The Court stated that even if the sex-plus-age theory were viable, Sherman would be unable to establish pretext in ACC's articulated reasons for terminating Sherman for the same reasons that the

Court held pretext was not established regarding the age discrimination claim under the ADEA.

However, there is relevant evidence regarding the issue of pretext in Sherman's sex-plus-age claim that was not addressed by the Court of Appeals in assessing the issue of pretext under the age discrimination claim. Courts have recognized that evidence of more favorable treatment of persons outside the plaintiff's protected class constitutes evidence of pretext. See *e.g., Jefferies v. Harris Co. Community Action Ass'n*, 614 F.2d 1025, 1034 (5th Cir. 1980). In that case, the plaintiff alleged unlawful sex discrimination under Title VII by the employer's discrimination based upon the plaintiff's status as a black female. The Court in *Jefferies* at 1034 indicated that:

> . . . when pretext is an issue that is, when Jefferies attempts to show that the employer's reason for the adverse employment action is merely a mask for discrimination by showing that persons outside her class were treated differently than herself black males and white females must be treated as persons outside of Jefferies' class. (footnote omitted).

In the instant case, the Court of Appeals regarding the age discrimination claim only addressed the treatment of younger sales representatives in comparison to that of Sherman. However, the persons outside Sherman's protected class regarding her sex discrimination claim based upon status as an older woman should be deemed to include older men which are not outside Sherman's protected class regarding the age discrimination claim. Among those courts recognizing the viability of a sex discrimination claim based upon status as an older

woman, Sherman's counsel is unaware of any precedent holding that older men are not outside the plaintiff's protected class. In fact, the U.S. District Court judge in the instant case, who recognized the viability of a sex discrimination claim under Title VII based upon status as an older woman, held that the only persons outside Sherman's protected class to which she could compare herself were older men.

In the instant case, there is evidence of more favorable treatment of an older male employee, Fred Karm, that was not addressed by the Court of Appeals in assessing the age discrimination claim. The Court of Appeals should have considered this evidence of preferential treatment of Fred Karm in comparison to Sherman in determining whether there was sufficient evidence of pretext regarding Sherman's sex-plus-age claim. Accordingly, the Court of Appeals erroneously held that there was insufficient evidence of pretext regarding Sherman's sex-plus-age claim under Title VII based solely upon an assessment of the evidence of pretext regarding the age discrimination claim.

Therefore, it must be determined whether a sex discrimination claim alleging discrimination based upon status as an older woman is appropriate under Title VII in order to resolve Sherman's sex discrimination claim in the instant case. If it is determined that such a claim is viable under Title VII, then the Court must assess additional evidence regarding the issue of pretext in the sex discrimination claim beyond that relevant to the age discrimination claim. This additional evidence of pretext regarding the sex discrimination claim may be ignored by the Court in resolving that claim only if it is determined

that the sex-plus-age theory of sex discrimination is not appropriate under Title VII.

Accordingly, the Court of Appeals improperly upheld the grant of summary judgment regarding Sherman's sex-plus-age claim under Title VII without determining whether such a claim may be brought under Title VII. This clear error by the Court of Appeals needs to be rectified. A plaintiff's claim brought under federal law should not be dismissed without determining the viability of such a claim if such a determination is required to appropriately resolve the case. This requirement provides further support for the need of the U.S. Supreme Court to assume jurisdiction over this case.

Another reason given by the Court of Appeals for refusing to recognize a sex-plus-age cause of action under Title VII was that no federal court of appeals nor the U.S. Supreme Court has recognized such an action. However, Sherman's counsel is not aware of any federal appellate decision addressing this issue. It appears to be an issue of first impression in the federal appellate system in the instant case. The fact that there have been no federal appellate court decisions recognizing a sex-plus-age claim when Sherman's sex-plus-age claim under Title VII was an issue of first impression at the federal appellate level was not an appropriate basis for the U.S. Court of Appeals for the Sixth Circuit to refuse to recognize such a claim in the instant case. There would be no recognition of new theories for claims at the federal appellate court level if this rationale were generally applied to cases of first impression throughout the federal appellate court system.

Federal courts of appeal must address on their merits new theories for claims that are matters of first impression presented to them. The U.S. Supreme Court should also assume jurisdiction over this case in the exercise of its supervisory power to expressly reject this action of the U.S. Court of Appeals for the Sixth Circuit in automatically rejecting a new theory for a claim because of an absence of existing federal appellate court precedent upholding the claim when it was a matter of first impression at the federal appellate court level.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 98-4035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARYL M. SHERMAN,

Plaintiff-Appellant,

v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

(Filed Sep. 1, 1999)

BEFORE: KEITH, and RYAN, Circuit Judges; HULL, District Judge.

RYAN, Circuit Judge. Plaintiff Caryl M. Sherman sued her former employer, American Cyanamid, for age discrimination, pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; for sex discrimination, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and for the combination of sex plus age discrimination. The defendant's motion for summary judgment was granted and the plaintiff appealed, asking us to recognize a new cause of action for sex plus age discrimination, or discrimination against "older women." We decline the invitation to decide the issue, partly because it is unnecessary for us to do so. Assuming Sherman made out a *prima facie* case for such a claim, she nevertheless was not able to establish that the defendant's reason for discharging her (a reduction in work force) was pretextual. Accordingly, we will affirm the district court's judgment.

I.

Sherman worked for American Cyanamid in various positions for over 20 years. In 1992, she was assigned to the company's Lederle division as a pharmaceutical sales representative. The defendant claims that Sherman's performance in this position was below average. She ranked among the lowest of the sales force in several rankings, and every supervisor who worked with Sherman criticized her for not following the company policy regarding "closing" the sale with the customer. These criticisms were well-documented.

In 1994, when the defendant restructured its sales force, it changed the boundaries of several territories, and decided to eliminate five territories, and therefore, five sales representatives. Sherman, who was 50 years old at the time, was one of the five representatives discharged. She claims that two younger women were transferred into her territory, which was in the Cleveland area, but the evidence indicated that the restructuring caused Sherman's territory to be eliminated. The defendant claims that the employees retained were more qualified and were better sales representatives than the plaintiff. Sherman claims that one of the younger employees, Dee Dee Kvassay, did not perform as well as Sherman did on some of the sales quotas and rankings. The defendant concedes this is so, but claims that Kvassay performed better than Sherman on key products. It also claims that Kvassay was a new employee and every supervisor stated that she had the potential to succeed, and was great at closing sales.

The district court granted the defendant's motion for summary judgment, holding that Sherman could not

establish a *prima facie* case for any of her claims because she could not establish that she was similarly situated to any of the employees who were retained. Because there were differences in some of the rankings Sherman was given, as compared to other employees, the court held that Sherman was not similarly situated to the other employees. The court also held that even if Sherman could establish a *prima facie* case for any of her claims, she had not shown that the defendant's legitimate, non-discriminatory reason for firing her was pretextual. The court entered summary judgment for the defendant. This appeal followed, with the plaintiff disputing the district court's conclusion regarding plaintiff's age discrimination claim, and her discrimination claim based on her status as an "older woman."

II.

When reviewing a district court's grant of summary judgment, we conduct a *de novo* review. *See Whisman v. Robbins*, 55 F.3d 1140, 1143 (6th Cir.1995). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A.

We will first address the plaintiff's age discrimination claim. The ADEA prohibits employers from discriminating against any individual with respect to compensation,

terms, conditions, or privileges of employment because of the person's age. *See* 29 U.S.C. § 623(a). Where there is no direct evidence of discrimination, we analyze ADEA cases under the familiar three-step *McDonnell Douglas* framework, where first, the plaintiff must present evidence sufficient to establish a *prima facie* case. Once she has done so, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action. Finally, the burden is on the plaintiff to show that the employer's nondiscriminatory explanation is mere pretext for intentional age discrimination. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir.1998).

When an employer terminates an employee because of a reduction in force or a reorganization, a *prima facie* case can be established by showing that: (1) the plaintiff was forty years old or older at the time of her dismissal; (2) that she was qualified for the position; (3) that she was discharged; and (4) " 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer signaled out the plaintiff for discharge for impermissible reasons.' " *Ercegovich*, 154 F.3d at 350 (citation omitted). This fourth element is met if the employee can demonstrate that comparable employees not in the protected group were treated more favorably, or if there is other circumstantial or statistical evidence supporting an inference of discrimination. *See id.*

The defendant and the district court seemed to assume that employees had to have exact rankings and sales for them to be similarly situated. Indeed, in *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir.1992), this

court stated that the plaintiff must show that the comparables are similarly situated in all respects. In that case, an employee was fired for bad behavior. The court stated the rule of the case, as follows:

> Thus, to be deemed "similarly-situated," the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Id. at 583.

In *Ercegovich*, the district court, applying *Mitchell*, stated that Ercegovich was not similarly situated to other employees who were allowed to transfer jobs because the other employees performed different job functions. This court, reversing, stated that the "district court misconstrued this circuit's precedent in applying an exceedingly narrow reading of the *Mitchell* decision." *Ercegovich*, 154 F.3d at 352. Our decision continued by explaining that *Mitchell* relied on factors relevant to the factual context in which the case arose – an allegedly discriminatory disciplinary action resulting in the termination of the plaintiff's employment. The same factors will generally be relevant in other cases alleging differential disciplinary action. *See id.* This court then stated:

> Courts should not assume, however, that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular

> aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in *Pierce*, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the relevant aspects."

Id. (citation omitted).

Applying this rule in *Ercegovich*, this court stated that it did not matter that Ercegovich did not perform the same job activities as those employees to which he sought to compare himself. It was sufficient that the positions held by all three employees were related to human resources functions, and all three positions were eliminated before the other two employees were transferred; therefore, the plaintiff had met the similarly situated test. The court stated: "Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias." *Id.* at 353.

In light of *Ercegovich*, we disagree with the district court that the plaintiff and those individuals to whom she was compared, the younger sales representatives, were not similarly situated. They were similar in all relevant aspects. There were some rankings where Sherman was higher, and some rankings where the younger employees

performed better. The defendant argues that it has the right to make business judgments regarding who will be a better employee without interference from this appellate court. This is true, and it leads to the conclusion that the defendant had a legitimate, nondiscriminatory reason for its decision, not to the conclusion that the employees were not similarly situated for the *prima facie* case analysis. Accordingly, while we believe that the plaintiff has established a *prima facie* case, we also think that the defendant has articulated a legitimate business reason for its decision. Management certainly has the right to act upon "gut feelings" about which employee is going to perform better; a long-time employee who has been having a great many problems and is unwilling or unable to close a sale properly, or a new employee who appears to have a great deal of potential to succeed as a sales representative.

Once a *prima facie* case is established, and the defendant has articulated a legitimate, nondiscriminatory reason for its actions, the plaintiff must prove that the employer's explanation was mere pretext for discrimination. To do so, the plaintiff is required to prove that either: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the discharge; or (3) the reason was insufficient to motivate discharge. *See Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). The type of pretext the plaintiff attempted to establish here is the second one: that circumstances tend to prove that an illegal motivation was more likely than the motivation offered by the defendant. The plaintiff must argue that "the sheer weight of the circumstantial evidence of discrimination makes it 'more

likely than not' that the employer's explanation is a pretext, or coverup." *Id.*

The only evidence to which the plaintiff can arguably point are two comments by her supervisor, Tom Flippen, who was the manager responsible for the termination decisions. One comment was that Sherman made a great deal of money for a pharmaceutical representative. The other comment was made to Jill Wise, a district manager. Apparently, Flippen was discussing with Wise a male candidate who was "older." Flippen stated that he did not like the candidate because he thought it would be difficult to work with an older candidate. He also stated something to the effect that you cannot teach an old dog new tricks.

The *Ercegovich* case discussed the issue of when allegedly age-biased statements prove pretext. In that case, there were remarks by one of the managers that " 'this company is being run by white haired old men waiting to retire, and this has to change,' " and a comment that the manager did " 'not want any employee over 50 years old on his staff.' " *Ercegovich*, 154 F.3d at 355. These comments were enough to raise a jury issue regarding the employer's motive for firing *Ercegovich*, even though they were not made by the manager in charge of terminating Ercegovich. It is clear that these comments are more inflammatory than the alleged comments made in this case, but the *Ercegovich* case sets forth several rules for analyzing the effect of age-biased comments. *See id.* at 354.

In assessing the relevancy of a discriminatory remark, the court first looks to the identity of the speaker,

and whether the speaker is the one responsible for making personnel decisions. *See id.* The court must then consider the substance of the remarks in determining their relevancy to a plaintiff's claim that an impermissible factor motivated the adverse decision to determine whether the remarks were too isolated or ambiguous to support a finding of age discrimination. *See id.* at 355. In addition, the court must look to the nexus, if any, between the remarks and the adverse action, although the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant. *See id.* Finally, each remark should not be viewed in isolation; instead, the court should be mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus. *See id.* at 356. In summation, this court stated:

> We do not mean to imply that any ageist comment by a corporate executive is relevant as evidence of a discriminatory corporate culture. Rather, the courts must carefully evaluate factors affecting the statement's probative value, such as "the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action," as well as whether the statement buttresses other evidence of pretext.

Id. at 357 (citations omitted).

In light of these rules of analysis, we are left with the firm conclusion that the plaintiff has not established pretext in this case. There is no direct nexus between Flippen's comments and Sherman's termination. Furthermore, the comment regarding Sherman making a great

deal of money was ambiguous, and the other comment concerning the older male employee is not sufficient to allow us to reach the conclusion that the "sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Manzer*, 29 F.3d at 1084. Therefore, we affirm the district court's judgment on Sherman's age discrimination claim

B.

Regarding the plaintiff's claim that she was discriminated against as an "older women" and that this court should recognize a separate cause of action for "sex plus age" discrimination, just as some of our sister circuits have recognized a "sex plus race" discrimination, *see, e.g., Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir.1980), we decline the plaintiff's invitation. First of all, no Federal Court of Appeals (including this one) nor the Supreme Court has recognized such a cause of action. Furthermore, assuming without deciding that we did recognize such a cause of action, and the plaintiff could establish a *prima facie* case, the plaintiff, for the reasons stated in the previous section, is unable to prove that the defendant's reason was pretextual. Accordingly, because deciding the issue will not change the result, we feel it is unwarranted for us to do so.

III.

For the reasons stated above, we **AFFIRM** the district court's judgment, granting the motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CARYL M. SHERMAN, Plaintiff, v. AMERICAN CYANAMID COMPANY, Defendant.	)	CASE NO. 1:97-CV-0185 Judge James S. Gwin MEMORANDUM OPINION AND ORDER (Filed Febr. 26, 1998)

On December 1, 1997, defendant American Cyanamid Company filed a motion for summary judgment [Doc. 42]. In its motion, defendant American Cyanamid says no material evidence supports plaintiff Caryl Sherman's claim for age or sex discrimination under federal and state law. Plaintiff Caryl Sherman filed her response on December 23, 1997 [Doc. 66]. Upon review of the record as a whole, the Court grants defendant's motion for judgment for the reasons that follow.

I

Plaintiff Caryl Sherman sues her former employer, defendant American Cyanamid. Defendant American Cyanamid employed Sherman from January 22, 1979, until August 31, 1994. Sherman alleges that in August 1994, defendant American Cyanamid unlawfully fired her because of her age (50) and sex (female) violating the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Ohio Revised Code Chapter

4112. In addition, plaintiff Sherman claims that in February 1992, defendant American Cyanamid unlawfully demoted her and unlawfully failed to return her to a hospital sales representative role in June 1993.

II

Defendant American Cyanamid manufactured and sold chemicals, pharmaceutical drugs and other industrial products throughout the United States.[1] American Cyanamid sold pharmaceuticals nationwide through its Lederle and Advantus Divisions.

In 1979, American Cyanamid hired plaintiff as a chemical sales representative. As a sales representative, plaintiff called on physicians and made sales presentations. In June 1988, the plaintiff requested and received a transfer to the Lederle Division as a pharmaceutical sales representative in the Cleveland District.

In August 1990, American Cyanamid chose the plaintiff to fill an open hospital sales representative position for the Cleveland area. In this position, she made sales presentations to physicians and hospital representatives in her assigned territory. Defendant American Cyanamid says performance with these new responsibilities was no more than average. She failed to meet her sales objectives for a priority product. Her managers claimed she needed to improve her sales closing skills.

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[1] In 1995, American Home Products Company purchased defendant American Cyanamid.

In January 1992, the American Cyanamid Company reorganized its sales force. Under its new alignment, the defendant demoted Sherman and assigned her as a pharmaceutical sales representative of Lederle. The defendant retained two longer serving representatives as hospital representatives.

American Cyanamid claims plaintiff then had problems in her new position. Defendant points to a low 1992 overall ranking as reflecting this. In this ranking, American Cyanamid ranked plaintiff 70th of 78 sales representatives in the Great Lakes Region. The defendant claims this poor ranking continued into 1993.[2]

In 1993, the defendant realigned its sales force. The defendant gave the plaintiff additional sales territory. With this new territory, the plaintiff did not achieve budget in many areas. Upon evaluation, American Cyanamid placed plaintiff on a performance improvement plan. The plan showed that plaintiff ranked near the bottom of the sales force in many categories. The plan criticized Sherman's ability to close sales, not her product knowledge. Defendant American Cyanamid continued to criticize Sherman's performance in later evaluations.

In August 1994, defendant American Cyanamid again restructured its sales force. The change eliminated some existing territories and reduced employees. In making these decisions, the defendant most used "Gold Cup" standings. The "Gold Cup" was a national sales program. Regional sales manager Thomas Flippen ranked plaintiff

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[2] In a "Gold Cup" national sales competition, plaintiff rated only 23rd of 31 in her Region.

low and recommended plaintiff be separated. Corporate leaders accepted the recommendation and separated plaintiff's employment.

On August 16, 1994, defendant told plaintiff they were eliminating her. Including the plaintiff, the defendant fired four other sales representatives from the Great Lakes Region as part of this realignment. Of these five employees, the plaintiff was the only employee over age 40. Three of the five separated were male.

III

The procedure for granting summary judgment is found in Fed.R.Civ.P. 56(c), which provides in part that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment is not proper if there is a material dispute over the facts, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit has recognized that *Liberty Lobby, Celotex* and *Matsushita* effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Street*, 886 F.2d at 1479 *quoting Liberty Lobby*, 477 U.S. at 257. The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. *Street*, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is therefore unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up,' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting *Street*, 886 F.2d at 1478).

The Sixth Circuit Court of Appeals further emphasized the showing required to defeat summary judgment, in *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992). There, the Court stated:

> "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict. . . . " The "mere possibility" of a factual dispute is not enough. Rather, in order to defeat summary judgment a plaintiff "must come forward with more persuasive evidence to support [his or her] claim than would otherwise be necessary." Where the defendant demonstrates that after a reasonable period of discovery the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his

> or her case, summary judgment should be granted.

Id. at 581-81 (citations omitted).

IV

Defendant American Cyanamid seeks judgment as to Count II of plaintiff's complaint on the ground that plaintiff Sherman failed to timely bring her claim.[3] In Count II of plaintiff's complaint, plaintiff Sherman makes claim of age discrimination under Ohio law and Federal law. Defendant American Cyanamid says a 180-day statute of limitations period stops the claim under Ohio law.

Plaintiff Sherman complains that American Cyanamid discriminated against her because of age when it fired her on August 16, 1994, and when it demoted her in February 1992.[4] Plaintiff Sherman brought this action on January 24, 1997.

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[3] American Cyanamid incorrectly moved this Court for judgment as to "state law age discrimination claims in *Count III of the Complaint*." Defendant's memorandum [Doc 42] at 9. In fact, Count III of Sherman's complaint only makes a claim for "sex discrimination" in violation of O.R.C. § 4112.02(A). Sherman makes claim for age discrimination in Count II of her complaint. Although Count II states a claim specifically arising under 29 U.S.C. § 623(a)(1) ("ADEA"), the Court takes plaintiff's reference to supplement jurisdiction in paragraph one of the complaint as plaintiff's intent to raise a state "age discrimination" claim.

[4] Sherman complains that this discrimination included the failure to return her to a hospital representative position during a July 1993 restructuring.

At the time the plaintiff brought this action, an age discrimination claim based on state law was required to be filed within the 180-day limitations period. *Dunn v. Medina General Hosp.*, 917 F.Supp. 1185, 1191 (N.D. Ohio. 1996) (discussing Ohio Revised Code § 4112.99 and *Bellian v. Bicron Corp.*, 69 Ohio St.3d 517 (1994)).

Because plaintiff filed her complaint almost two and one half years after the discriminatory act, her state law age discrimination claims in count II of the complaint are time barred. Accordingly, the Court gives defendant American Cyanamid judgment as to plaintiff Sherman's age discrimination claims under Ohio Rev.Code § 4112.09, because they are barred by Ohio Rev.Code. § 4112.99.

V

Defendant American Cyanamid also seeks judgment finding that plaintiff's claims for age and sex discrimination relating to a 1992 job reassignment are precluded by her failure to first file a charge relating to this claim with the EEOC before bringing this action.[5]

On July 10, 1994, plaintiff Sherman filed a charge with the Ohio Civil Rights Commission. In that charge, Sherman alleged that American Cyanamid had discriminated against her. She states:

> "I worked for Respondent between 1979 and August 16, 1994, when I was laid off.

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[5] Plaintiff Sherman makes complaint over both her February 1992 reassignment and the July 1993 failure to place her back into a hospital representative role.

> "I believe I was laid off because of my age, 50, in violation of the Age Discrimination in Employment Act (ADEA) and because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended."

In this charge, plaintiff Sherman made no complaint concerning any action by defendant American Cyanamid in the 1992 job reassignment.

In order for federal courts to have subject matter jurisdiction of Title VII claims, the claimant must first unsuccessfully pursue administrative relief. *Love v. Pullman Co.*, 404 U.S. 522 (1972). Courts have thus held that if the claimant did not first present a claim to EEOC that they may not later pursue a claim in court. The judicial complaint must be limited "to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991) (wherein an employment discrimination plaintiff was precluded from alleging race discrimination where administrative complaint had alleged only national origin discrimination) (quoting *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 446 (6th Cir. 1977)).

Plaintiff Sherman's claims regarding the February 1992 demotion and the 1993 failure to return her to her former position are not within the scope of her July 1994 charge to the Ohio Civil Rights Commission. As related, that charge deals only with plaintiff Sherman's August 16, 1994, lay off. Additionally, that charge says the discrimination took place on August 16, 1994. Because Sherman made no claim to the Ohio Civil Rights Commission regarding the 1992 demotion, this Court is without jurisdiction to entertain this claim. Accordingly, the Court

gives defendant American Cyanamid judgment as to all claims concerning plaintiff's 1992 demotion.

VI -

Defendant American Cyanamid next seeks judgment as to Sherman's Title VII, ADEA, and Ohio law claims. The defendant says no direct evidence supports plaintiff Sherman's claims. The defendant says the plaintiff cannot make a *prima facie* showing of discrimination under the circumstantial evidence standard of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Even if the plaintiff could make such a showing, the defendant says it forwards a legitimate, nondiscriminatory reason for Sherman's separation and she cannot show that defendant's reason was a pretext for discrimination.

Plaintiff Sherman says the defendant American Cyanamid discriminated against her, violating Ohio Revised Code § 4112.02 and Title VII of the Civil Rights Act of 1964. Under 42 U.S.C. § 2000e-2(a)(1), it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . . " Likewise, Ohio law also specifically forbids employment discrimination "because of sex." Pursuant to Ohio Revised Code § 4112.02(A), it is an unlawful discriminatory practice in the state for "any employer, because of . . . sex . . . to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter

directly or indirectly related to employment." Ohio Revised Code § 4101.17 forbids discrimination based upon age.[6]

In reviewing claims under Ohio Revised Code § 4112.02 and 4101.17(A), Ohio uses the same standard employed in the review of cases under Title VII of the Civil Rights Act of 1964.[7] *Barker v. Scovill, Inc., Schrader Bellows Div.*, 6 Ohio Plaintiff Stein.3d 146 (1983). Consequently, the Court reviews Plaintiff's federal and state age/sex discrimination claims simultaneously.[8]

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[6] Ohio Revised Code § 4101.17(A) provides:

> No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee between the ages of forty and seventy who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

[7] In *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm'n*, 66 Ohio St.2d 192, 196 (1981), the Court held:

> Ohio uses the same test. In previous cases, however, we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *State ex rel. Republic Steel v. Ohio Civil Rights Comm.*, 44 Ohio St.2d 178 (1975); *Weiner v. Cuyahoga Community College District* (1969), 19 Ohio St.2d 35, *cert. denied*, 396 U.S. 1004 (1970).

[8] Ohio Revised Code § 4112.02(N) provides right to bring private actions. It says:

> (N) An aggrieved individual may enforce the individual's rights relative to discrimination on the

Here, Plaintiff Sherman gives no direct evidence[9] of either age or sexual discrimination.[10] Having no direct evidence of discrimination, Sherman must make the showing described in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

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basis of age as provided for in this section by instituting a civil action, within two years after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

[9] Upon deposition, plaintiff Sherman testified as follows:

Q. Okay. Other than what you've testified to, did anyone in the company make any statement or comment which you believe is discriminatory against older women?

* * *

Q. So you haven't heard of one, in other words?

A. (Witness shaking head from side to side.)

Q. Is that correct?

A. That's correct.

See Plaintiff Sherman Dep. at Tr. 96.

The Court has reviewed plaintiff Sherman's claims of direct evidence of discrimination. The Court finds none support her claims. Thus, the claim that she was discriminated against because she made more money is neither supported nor evidence of sex discrimination. To like effect, Sherman's claims of Flippen's comment concerning an older male employee, even if believed, show nothing to support plaintiff Sherman's claim.

[10] The *McDonnell Douglas* formula is inapplicable, however, to cases in which the Title VII plaintiff presents credible, direct evidence of discriminatory animus. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111 (6th Cir. 1987); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985), *cert denied*, 490 U.S. 1064 (1989).

In *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 349 (6th Cir. 1997), the Sixth Circuit described the showing required under *McDonnell Douglas*:

> When a plaintiff attempts to establish its case using the McDonnell Douglas-Burdine paradigm, the evidence which establishes the prima facie case is extremely important. In order to prove a prima facie case of discrimination, a plaintiff must show: 1) that he is a member of a protected group, 2) that he was subject to an adverse employment decision, 3) that he was qualified for the position, and 4) that he was replaced by a person outside of the protected class. *Id.* quoting *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (1995) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)).

The *McDonnell Douglas* framework consists of three stages. At the first stage, the plaintiff must establish a *prima facie* case that the employer discriminated against her. Second, the employer can produce evidence of a legitimate, nondiscriminatory reason for its action. Finally, the plaintiff attempts to discredit the employer by proving that the employer's reason was a pretext for discrimination.

In the first stage, the plaintiff has the initial burden of establishing, by a preponderance of the evidence, a *prima facie* case. A plaintiff can do this by showing (1) the plaintiff is a member of a class protected by Title VII; (2) the plaintiff was qualified for a job; (3) the plaintiff was terminated, despite her qualifications; and (4) after this

termination, the employer filled the position with a nonmember of the protected class.[11] Once shown, the *prima facie* case requires the employer to go forward with evidence of a nondiscriminatory intent. The *prima facie* case creates a refutable presumption that the real reason was discriminatory. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) the Supreme Court further explained this.

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. *Id.* at 577.

Since the *prima facie* case creates a presumption of discrimination, if the employer fails to respond to the *prima facie* case and if the trier of fact believes the plaintiff's *prima facie* evidence, then the plaintiff will receive judgment. Only the burden of production shifts to the employer; never does the defendant need to persuade the trier of fact that "it was actually motivated by the proffered reasons."[12] The employer must simply articulate a

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[11] *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

[12] In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the Court explained this as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by

reason for his or her action through the introduction of admissible evidence.

The plaintiff keeps the burden of persuasion. This is so because the plaintiff maintains the burden of showing that the employer intentionally discriminated against the plaintiff.[13] The burden of production then shifts back to the plaintiff, who must persuade the trier of fact that the employer's articulated reason is a "pretext."

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producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiffs. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

[13] In *Burdine*, the Court wrote that the explanation must be "legally sufficient to justify a judgment for the defendant" if it were believed by the trier of fact.

To prove that defendant American Cyanamid's reasons are pretextual, Sherman must show that the reasons have no basis in fact, that the reasons did not in fact motivate the discharge, or, if they were factors in defendant's decision, that they were jointly insufficient to motivate the discharge. *Maddox v. University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995) (citing *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987)).

Under controlling law, Plaintiff Sherman can make a *prima facie* claim of discrimination by showing that a non-protected person similarly-situated was treated differently. To make this showing, Sherman needs to show that the persons she is being compared with were so situated as to be in a very similar situation. In *Mitchell*, the Court described this as follows:

> As the Sixth Circuit has frequently phrased the requirements of a prima facie claim of disparate treatment using such a "comparable non-protected person was treated better" element as one of the requisites, the plaintiff must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than similarly-situated non-minority employees.
>
> * * *
>
> It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are similarly-situated in all respects. Thus, to be deemed "similarly-situated", the individuals with whom the

> plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Id* at 582-83 (citations omitted).

As related, *McDonnell Douglas* requires a discharged employee, *who has been replaced,* to show that they were: (1) members of a protected class; (2) subjected to an adverse employment action; (3) qualified for the position; and (4) replaced by a male or substantially younger person. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 1309 (1996).

In a corporate reorganization situation involving job loss, a dismissed plaintiff cannot show the fourth element of the evidentiary framework because the employer has not replaced him. *See Sovacool v. General Tire, Inc.*, 108 F.3d 1377 (6th Cir. 1997); *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990). In a reorganization situation, the plaintiff not only must show that she was female or more than forty, was discharged, and was qualified, but must also present "additional direct, circumstantial, or statistical evidence tending to demonstrate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.;* see also *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986).[14]

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[14] Plaintiff Sherman misrepresents the record to this Court. In her brief opposing summary judgment, Sherman says:

> "There is evidence that would support a finding that Sherman was terminated by Defendant ACC on or

In August 1994, the defendant terminated Sherman with three men and one other woman. Of those *terminated*, all were younger than Sherman and the majority were male. In this respect, the group chosen for discharge gives no suggestion that the defendant discharged the plaintiff for impermissible reasons.

The group retained after Sherman's separation does not show the use of impermissible reasons in her firing. After the discharges, nineteen of thirty-one Cleveland employees were female.

Plaintiff Sherman also claims that defendant discriminated against a subclass of older women. In this regard, Sherman makes a claim of "sex plus" discrimination.

The Supreme Court has adopted the proposition that sex considered with a second characteristic – "sex plus" – can delineate a "protected group" and can therefore serve as the basis for a Title VII suit. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Martin Marietta*, the defendant refused to hire women with pre-school-aged children while hiring men who (viewed from the employer's perspective) had the same problem. While having this policy, the employer continued hiring women, 75 to 80 percent of those hired for the position were women. Nevertheless, the Court held that "permitting one hiring policy for women and another for men –

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about August 16, 1994 because of her status as an older woman (Larry McVay dep. tr. at Ex. 11)." Plaintiff's opposition brief at 5.

However, the Court has reviewed McVay's deposition (Tr. at Exhibit 11) and finds absolutely nothing supporting Sherman's representation to this Court.

each having pre-school-age children" – violated Title VII. Under the standard announced in *Martin Marietta*, women are to be afforded job opportunities on an equal footing with men. See *Fisher v. Vassar College*, 70 F.3d 1420 (2nd Cir. 1995).

At trial, plaintiff Sherman would need show that the defendant treated her differently from similarly situated members of the opposite sex. In responding to a motion for summary judgment, Sherman "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)).

Plaintiff Sherman needs to show that the defendant treated a male near her age differently. Sherman must also show that the comparable male is similarly-situated in all respects. The individuals with whom the plaintiff seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell*, 964 F.2d 577, 582-83.

Plaintiff Sherman identifies several medical sales representatives in the Cleveland District who were lower ranked than Sherman yet were retained at the time defendant terminated Sherman. She says Fred Karm, Tonda DiPlacido, and Robert McCarthy, Jr., were all ranked lower. DiPlacido is a female. McCarthy is a male who is

younger than Sherman. Karm is a male who is older than Sherman.[15]

In response, Defendant American Cyanamid gives evidence that Karm was not similarly-situated in all respects. While acknowledging that Karm, like Sherman had received similar ratings in 1993, American Cyanamid says Karm significantly outperformed Sherman in 1994. At the time of the layoffs, Karm was outperforming Plaintiff in the sales of key products. For instance, Karm was 1st of 8 sales representatives in the marketing of Key Advantus; 2nd of 8 in the marketing of Suprax Tablets; 3rd of 7 in the marketing of Zosyn; 1st of 8 in the marketing of Ziac; and 7th of 8 in the marketing of Verelan. In contrast, Sherman was ranked 7th of 8 sales representatives in the marketing of Key Advantus; 8th of 8 in the marketing of Suprax Suspensions; 1st of 8 in the marketing of Suprax Tablets; 6th of 7 in the marketing of Zosyn; 7th of 8 in the marketing of Tetramune; and 4th of 8 in the marketing of Acelamune. At the time of the separation, Karm was also ranked higher than the plaintiff in Gold Cup standings. Accordingly, the Court finds that Karm was not similarly situated in all respects.

Plaintiff Sherman also says that defendant American Cyanamid retained Tonda DiPlacido, and Robert McCarthy, Jr., despite their having lower rankings than Sherman. However, Defendant American Cyanamid likewise gives evidence that DiPlacido and McCarthy were not similarly situated.

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[15] DiPlacido's date of birth is April 24, 1961. McCarthy's date of birth was October 19, 1965,. Karm's date of birth is October 22, 1939.

Specifically, American Cyanamid gives evidence that DiPlacido and McCarthy were outperforming the plaintiff at the time defendant decided to separate Sherman. The defendant shows that while DiPlacido and McCarthy were ranked lower than the plaintiff at year-end 1993, they were outperforming the plaintiff in 1994 Gold Cup points.[16] Defendant American Cyanamid shows that DiPlacido was outperforming the plaintiff in the sales of key products.[17] Plaintiff Sherman does not show that DiPlacido and McCarthy were similarly situated in all ways.

Also, plaintiff's comparison with DiPlacido and McCarthy does not support plaintiff's "sex plus age" claim. A "sex plus age" claim necessarily involves comparison with a male, otherwise similarly situated, here a similarly situated older male. *Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d 1199, 1202-1204 (10th Cir. 1997) (stating "gender-plus claimants must establish that they were treated differently from similarly situated members of the opposite sex."). In a sex-plus discrimination case, the Title VII plaintiff does not allege

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[16] Defendant American Cyanamid suggests that the year end 1993 rankings are less important. Defendant shows that the year end 1993 ranking placed James Kiraly (male, age 34) and Julie Carr (female, age 27), higher than Plaintiff. Despite this, both Carr and Kiraly were terminated in the 1994 reorganization.

[17] Defendant American Cyanamid gives evidence that in 1994, DiPlacido had sold 97.7% of budgeted sales of Key Advantus while Sherman's had only reached 73.3%; DiPlacido had sold Key Lederle 125% of quota on Ziac and 124.9% of quota on Verelan while Sherman had sold only 66.2% of quota of Tetramune and 63.5% of quota of Acelamune.

that an employer discriminated against a protected class as a whole, but rather that the employer disparately treated a subclass within the protected class. Thus, Title VII prohibits employers from treating older women differently than older men, but it does not protect age alone. *Fisher,* 70 F.3d at 1447. To establish a gender-plus age claim, plaintiff Sherman would need show that defendant American Cyanamid treated older women less favorably than it treated older men. Crucially, the comparison must be with like age men.

In the instant case, Plaintiff Sherman fails to show material facts sufficient to support her claim of gender discrimination under Title VII or Ohio Revised Code § 4112.02(A).

VII

Plaintiff Sherman separately claims that American Cyanamid discriminated against her because of age. To establish a *prima facie* case of age discrimination, Sherman must show that the defendant treated her differently than similarly-situated non-protected employees. In making this showing, Sherman must again show that the "comparables" are similarly-situated in all respects. *Mitchell,* 964 F.2d at 582-83.

Plaintiff claims that Dee Dee Kvassay and Tonda DiPlacido, younger women, were treated differently.[18] At the time of plaintiff's separation, Kvassay had only been

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[18] Dee Dee Kvassay was 36 years old at the time plaintiff Sherman was separated. Tonda DiPlacido was 34 years old at the time Sherman was separated.

with the Company since July 1993. She outranked Plaintiff in Gold Cup standings for 1993. In 1994, Kvassay was below targets on several accounts but had higher performance ratings in sales of the priority drug Suprax suspensions. Defendant American Cyanamid defends the retention of Kvassay by suggesting she had only been with the Company for one year and had future potential to succeed. As related, DiPlacido was ranked lower than the plaintiff at year-end 1993 but was outperforming the plaintiff in Gold Cup points in 1994. Defendant American Cyanamid shows that DiPlacido was also outperforming the plaintiff in the sales of key products.

In *Mitchell*, 964 F.2d 577, 582-83, the plaintiff claimed she made out a prima facie case by showing that one non-minority employee had a poor attendance record and alleged that another non-minority employee cursed at her team leader but neither was fired. The *Mitchell* plaintiff argued that non-minority employees, guilty of conduct of "comparable seriousness" to the conduct for which they fired her, received more lenient treatment. The Court found that the plaintiff failed to show that the two white employees she identified as not having been fired were "similarly situated in all respects." Specifically, the Court said that "[i]t is the discrimination plaintiff's burden to establish that the other employee's acts were of 'comparable seriousness' to his or her own infraction." *Id.* at 583 n. 5.

In the instant case, the plaintiff likewise does not show that she was "similarly situated" to Kvassay and DiPlacido and thus, she fails to make out a prima facie case. As such, defendant American Cyanamid is entitled to judgment as to plaintiff's Title VII and state law sex

discrimination claims. Defendant American Cyanamid is also entitled to judgment as to plaintiff's ADEA claim.

VIII

As described, the Court finds that plaintiff Sherman fails to make out a *prima facie* case showing age or sex discrimination. Even if the plaintiff had made such a showing, the Court finds that defendant American Cyanamid has given evidence of a legitimate, nondiscriminatory reason for Plaintiff Sherman' release. Having articulated a legitimate, nondiscriminatory reason for the termination, the burden shifts back to the plaintiff to prove that the defendant's proffered reasons were pretextual. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Pretext is established by a direct showing that a discriminatory reason more likely motivated the employer or by an indirect showing that the employer's explanation is not credible.

The evidence used in determining whether Sherman was similarly situated involves determining whether American Cyanamid's explanation is credible. The defendant shows evidence that Sherman received counseling and correction. The defendant also shows evidence that Sherman produced near the bottom of its sales representatives. In reply, Sherman gives only evidence that other, non-protected employees had equivalent performance. Taken as a whole, there is nothing showing that age or sex concerns motivated defendants choice to separate Sherman rather than separate others.

The dominant purpose of Title VII is to root out discrimination in employment. *E.E.O.C. v. Shell Oil Co.,*

466 U.S. 54, 77 (1984). Title VII prohibits all discrimination in employment based upon race, sex, and national origin. The statute was not intended to diminish traditional management prerogatives. Under Title VII, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Employers may make decisions based on any nondiscriminatory reason. "A reason is legitimate for purposes of the civil rights laws if it is nondiscriminatory, even if it is mean-spirited, ill-considered, inconsistent with humane personnel policies, or otherwise objectionable." *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282 (6th Cir. 1991), *cert. denied*, 503 U.S. 945 (1992).

For these reasons, the Court finds that defendant American Cyanamid is entitled to judgment as to all claims.

IT IS SO ORDERED.

Dated: February 26, 1998

/s/ James S. Gwin
Judge James S. Gwin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CARYL M. SHERMAN, Plaintiff,	)	CASE NO. 1:97-CV-0185 Judge James S. Gwin
v.	)	OPINION
AMERICAN CYANAMID COMPANY, Defendant.	)	(Filed Feb. 26, 1998)

The Court has filed its memorandum opinion and order granting defendant American Cyanamid's motion for summary judgment. Accordingly, this action is hereby terminated pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

Dated: February 26, 1998

/s/ James S. Gwin
Judge James S. Gwin
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CARYL M. SHERMAN, Plaintiff(s), -vs- AMERICAN CYANAMID COMPANY, Defendant(s).	)	Case No. 1:97cv185 ORDER (Filed Jul. 28, 1998)

Before this Court are Plaintiff's motion to alter or amend judgment filed on March 12, 1998, [Doc. 99], defendant's memorandum in opposition, and plaintiff's reply thereto. Upon consideration, said motion to alter or amend judgment is hereby denied.

IT IS SO ORDERED.

/s/ James S. Gwin
JUDGE JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

98-4035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARYL M. SHERMAN, Plaintiff-Appellant,	)	
v.	)	ORDER
AMERICAN CYANAMID COMPANY,	)	(Filed Oct. 27, 1999)
Defendant-Appellee.	)	

BEFORE: KEITH and RYAN, Circuit Judges; and HULL*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk lg

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*Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

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§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Sec. 623. Prohibition of Age Discrimination

(a) *Employer practices*

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's age;

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§ 4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(A) for any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.